No. 84-835 (3)
No. 84-776 (2)

In The
Supreme Court of the United States
October Term, 1984

STATE OF NEW JERSEY,
Department of Corrections,
Petitioner,

v.

RICHARD NASH,
Respondent.

PHILIP S. CARCHMAN,
Mercer County Prosecutor,
Petitioner,

v.

RICHARD NASH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER PHILIP S. CARCHMAN, MERCER COUNTY PROSECUTOR

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QUESTION PRESENTED FOR REVIEW

Whether the Interstate Agreement on Detainers, *N.J.S.A.* 2A:159A-1 *et seq.* applies to a detainer based on a violation of probation or parole?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

1. Philip S. Carchman, Mercer County Prosecutor, Appellant
2. State of New Jersey, Department of Corrections, Intervenor
3. Richard Nash, Appellee

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STATEMENT OF JURISDICTION

The United States District Court had subject matter jurisdiction over the proceedings below pursuant to 28 *U.S.C.* Sec. 2254. The United States Court of Appeals for the Third Circuit had jurisdiction to review the final judgment of the District Court pursuant to 28 *U.S.C.* Sec. 1291. The Circuit Court's opinion was filed and judgment was entered on July 10, 1984. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on August 27, 1984. The mandate was filed on September 4, 1984. A Petition for Writ of Certiorari was filed on November 5, 1984, and granted on January

14, 1985. This Court has jurisdiction to review the Circuit Court's judgment pursuant to 28 *U.S.C.* Sec. 1254(1).

RELEVANT STATUTE

Interstate Agreement on Detainers, *N.J.S.A.* 2A:159A-1 *et seq.*

(Reproduced in Appendix to Petition for Writ of Certiorari)

STATEMENT OF THE CASE

On January 3, 1975, a Mercer County Grand Jury returned Indictment 495-74 charging Richard Nash with Breaking and Entering With Intent to Rape, *N.J.S.A.* 2A:94-1, and Assault With Intent to Rape, *N.J.S.A.* 2A:90-2.

On June 21, 1976, defendant Nash entered a *retraxit* plea of guilty to both counts of Indictment 495-74. Pursuant to a plea agreement, the State made no recommendation as to the sentence and agreed not to request that bail be increased at the time of the plea. On October 29, 1976, defendant Nash was sentenced to an aggregate term of 36 months in the Mercer County Correction Center, 24 months suspended, and two years probation.

Defendant Nash appealed to the New Jersey Superior Court, Appellate Division, on the grounds that the sentence was manifestly excessive, unduly punitive, and an

abuse of the trial judge's discretion. On December 11, 1978, the Appellate Division denied Nash's appeal.

On June 13, 1978, while still serving the probationary portion of his New Jersey sentence, defendant Nash was arrested in Montgomery County, Pennsylvania for Burglary, Involuntary Deviate Sexual Intercourse, and Loitering. Subsequently, on June 21, 1978, the Mercer County Probation Department filed a detainer against defendant Nash charging him with a violation of probation.

On March 14, 1979, defendant Nash was convicted in Pennsylvania of Burglary, Involuntary Deviate Sexual Intercourse and Loitering. On July 13, 1979, the Pennsylvania Court sentenced the defendant to a minimum of 5 years and a maximum of 10 years to be served at the State Correctional Institution at Dallas, Pennsylvania.

On April 13, 1979, three months before he was sentenced for his Pennsylvania convictions, defendant Nash sent a letter to the Mercer County Prosecutor's Office in which he contested the validity of his Pennsylvania convictions. Defendant Nash asked for advice in the letter as to what he should do in reference to the New Jersey probation violation detainer. However, the letter makes no specific reference to the Interstate Agreement on Detainers. On May 16, 1979, the Prosecutor's Office responded by letter to defendant Nash. The letter advised him to contact his probation officer as the Prosecutor's Office had no jurisdiction over the case at this point.

On May 17, 1979, defendant Nash wrote to the Mercer County Probation Department and requested assistance

with regards to his probation violation detainer. On May 23, 1979, Probation Officer Robert Hughes responded to defendant Nash by letter. Probation Officer Hughes indicated that he had spoken with the Honorable A. Jerome Moore, J.S.C., who stated that no action could be taken on the detainer until defendant Nash was sentenced on the Pennsylvania charges. Probation Officer Hughes suggested that Nash contact the Probation Department after his Pennsylvania sentencing date.

On July 20, 1979, one week after his Pennsylvania sentencing, defendant Nash again wrote to the Mercer County Probation Department and requested that action be taken on the probation violation detainer as soon as possible. Probation Officer Judith Giordano replied by letter dated August 3, 1979, in which she stated that a hearing on the probation violation would be held as soon as an attorney from the Public Defender's Office was appointed to represent him. She further indicated that if defendant Nash did not hear from the Public Defender's Office within one week, he should write to them. When defendant Nash was not contacted by that office, he wrote again to Probation Officer Giordano with a copy of the letter sent to the Public Defender. Defendant Nash's two page letter once more contested the validity of his Pennsylvania conviction and only made reference to his New Jersey detainer in the last sentence.

Defendant Nash, by his own admission, received a Sentence Status Report from the Pennsylvania authorities on August 17, 1979. This report informed defendant Nash of his outstanding probation violation detainer and advised him of the proper procedure to dispose of his detainer under the Interstate Agreement on Detainers, *N.J.S.A.* 2A:159A-1 *et seq.* (IAD).

Defendant Nash took no action until November 5, 1979, when he sent a letter to Mr. Harold Holloway, Chief Probation Officer, requesting final disposition of the probation violation detainer pursuant to the Interstate Agreement on Detainers. On the same day, defendant Nash sent a letter to the Honorable George Y. Schoch, A.J.S.C., and enclosed a copy of his letter to Chief Probation Officer Holloway. On November 13, 1979, Judge Schoch referred defendant Nash's letters to the Mercer County Prosecutor's Office with a note suggesting that Nash was "invoking the terms of the Interstate Agreement on Detainers Act . . ."

On December 6, 1979, defendant Nash executed Form II of the Interstate Agreement on Detainers formally requesting transfer to Mercer County to dispose of the charge of violation of probation. This form was forwarded to Mercer County along with supporting documents, including Form IV of the Interstate Agreement on Detainers, and an offer by the Pennsylvania authorities to deliver temporary custody of defendant Nash to the Mercer County authorities.

On December 14, 1979, the Mercer County Prosecutor's officer responded to the request by sending Form VI of the Interstate Agreement on Detainers to the State Correctional Institution at Dallas, Pennsylvania. This form authorized the Mercer County Sheriff's Office to take custody of defendant Nash on December 20, 1979. The Mercer County Sheriff's Officers arrived in Dallas, Pennsylvania on the appointed date but were informed for the first time that as of December 11, 1979, defendant

Nash had been temporarily moved to a penal institution at Graterford, Pennsylvania.[1]

On February 28, 1980, the Mercer County Prosecutor's Office sent another Form VI of the Interstate Agreement on Detainers to the State Correctional Institution at Dallas, defendant Nash having been returned there on February 26, 1980. The new Form VI designated March 10, 1980 as the date when the Mercer County authorities would take custody of defendant Nash.

Defendant Nash reacted by refusing to sign the additional papers required to allow the transfer to New Jersey. Rather, on March 6, 1980, Nash filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. An amended petition was filed on December 9, 1980. Pursuant to 28 *U.S.C.* 1406, the case was transferred to the United States District Court for the District of New Jersey on February 3, 1981. (App. 101) On March 26, 1981, the Mercer County Prosecutor's Office filed an answer to defendant Nash's habeas petition.

On June 24, 1981, the Honorable Dickinson R. Debevoise, U.S.D.J., ordered the Prosecutor's Office to provide the court with specific information regarding defendant Nash's state court remedies. (App. 95) This information was provided on July 20, 1981; subsequently, on July 24, 1981, Judge Debevoise ordered that Nash's federal action be stayed until the completion of the state court proceedings available to him. (App. 81)

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[1] Given that the officers possessed a writ for defendant issued to the warden of the Dallas Prison, they had no authority to proceed to Graterford to take custody of him there.

On August 24 and 25, 1981, the Honorable Richard J.S. Barlow, Jr., J.S.C., held a hearing in which he denied defendant Nash's motion to dismiss the probation violation detainer. In addition, Judge Barlow ruled that Nash's Pennsylvania convictions constituted a violation of probation. (App. 58) On October 9, 1981, defendant Nash was resentenced on Indictment 495-74 to consecutive 18 month sentences at the Mercer County Correction Center. (App. 77)

Defendant Nash appealed to the New Jersey Superior Court, Appellate Division, on the grounds that the State failed to dispose of the probation violation detainer within the time limits imposed by the Interstate Agreement on Detainers. The Appellate Division denied the appeal (App. 44); a petition for certification to the New Jersey Supreme Court was denied on November 12, 1982. (App. 43)

Having fully exhausted his state remedies, defendant Nash's federal habeas proceeding was returned to the trial list. On January 4, 1983, Judge Debevoise held a hearing on the matter at the United States Court House in Philadelphia. The District Court had subject matter jurisdiction pursuant to 28 *U.S.C.* Sec. 2241 and 28 *U.S.C.* Sec. 2254. On March 7, 1983, Judge Debevoise issued his opinion granting defendant Nash's petition and declaring his conviction a nullity. (App. 21) *Nash v. Carchman*, 558 *F. Supp.* 641 (D.N.J. 1983). Judge Debevoise ruled that the Interstate Agreement on Detainers extends to a probation violation detainer and, furthermore, that the State violated defendant Nash's rights under the statute. An order to this effect was entered on March 21, 1983.

Philip S. Carchman, Mercer County Prosecutor, appealed to the United States Court of Appeals for the Third Circuit. The Circuit Court had jurisdiction to review an appeal from a final judgment pursuant to 28 *U.S.C.* Sec. 1291. Since the District Court framed the issue in terms of probation and parole violation detainers, 558 *F.Supp.* at 643, the State of New Jersey Department of Corrections successfully sought intervention on the basis that it has legal custody over parolees released from the New Jersey State Prison System. *See N.J.S.A.* 30:4-123.59(a). The Court of Appeals affirmed the judgment of the District Court; the Court's opinion was filed and judgment was entered on July 10, 1984. *Nash v. Jeffes,* 739 *F.*2d 878 (3rd Cir. 1984). A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on August 27, 1984. (App. 103) The mandate was filed on September 4, 1984. (App. 105)

Philip S. Carchman, Mercer County Prosecutor, filed a Petition for Writ of Certiorari on November 5, 1984. The State of New Jersey Department of Corrections filed a Petition for Writ of Certiorari on November 20, 1984. The Court consolidated both cases and and granted the petitions on January 14, 1985.

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SUMMARY OF ARGUMENT

The Interstate Agreement on Detainers *N.J.S.A.* 2A:159A-1 *et seq.* permits a prisoner incarcerated in one state against whom a detainer has been lodged based on an untried indictment, information or complaint

from another state, to request to be returned to such state to answer the pending charge. The issue arises as to whether detainers based on probation or parole violations are within the scope of the Act.

The plain language of the Act indicates that probation or parole violation detainers are outside the scope of the Act. The statute refers to detainers based on an "untried indictment information or complaint." In the case of a probation or parole violation detainer, there is nothing to be tried. The defendant has already been tried on the underlying charge and is before the court as part of the sentencing process.

Secondly, the purpose of the Act supplies the reason as to why its drafters limited the scope to detainers based on untried indictments, information or complaints. The statute is not designed to dispose of all detainers; indeed, many detainers are based on new convictions for which the prisoner must return to serve his sentence. The statute is designed to ensure that detainers that are lodged have a valid underlying charge. Given that detainers may have adverse effects on a prisoner's rehabilitative prospects, the Act ensures that the detainers that are lodged have a valid basis. The concern, obviously, is over detainers based on charges that have not yet been tried. On the other hand, a detainer based on a probation or parole violation is always valid per se since the new conviction conclusively establishes the violation.

Finally, while the Act is also designed to effectuate a prisoner's right to a speedy trial, this concern is directed towards detainers based on charges that have not yet been tried. The right to a speedy trial is not implicated with a

probation violation. Additionally, since the new conviction conclusively establishes the violation, there is no risk of unfair delay.

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ARGUMENT

The Interstate Agreement On Detainers Does Not Apply To Detainers Based On Violations Of Probation Or Parole.[2]

POINT ONE: The Plain Language Of The Act Excludes Detainers Based On Probation Or Parole Violations.

In response to the problem of detainers based on untried charges lodged by authorities in one jurisdiction against prisoners incarcerated in another, the Interstate Agreement on Detainers was drafted to provide for a uniform and orderly system for disposing of such detainers promptly and efficiently. The IAD is "congressionally sanctioned interstate compact the interpretation of which

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[2] It is unclear whether or not the Circuit Court's opinion applies to parole as well as probation violation detainers. Although the facts of this case involve only a probation violation detainer, the District Court framed the issue as whether the Act applied to "a charge of parole or probation violation," *Nash v. Carchman*, 558 *F.Supp.* 641, 643 (D.N.J. 1983). This was the basis for intervention by the New Jersey Department of Corrections when the case was pending before the Circuit Court. The Circuit Court affirmed the decision for the District Court; the Court did not address the distinction, if indeed there is any in this context, between probation and parole, but held that "a probation violation is covered by the Act." *Nash v. Jeffes*, 739 *F.2d* 878, 884 (3rd Cir. 1984). The New Jersey Department of Corrections nevertheless petitioned this Court for a writ of certiorari (No. 84-835). This petition was granted on January 14, 1985.

presents a question of federal law." *Cuyler v. Adams*, 449 *U.S.* 433, 442 (1982). In addition to having been enacted into federal law, the Act has also been adopted by forty-eight states and the District of Columbia.

It is provided in Article III of the IAD that:

> [w]henever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any *untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner,* he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint. . .

N.J.S.A. 2A:159A-3(a) (emphasis added).

Article III of the IAD, by its own terms, does not apply to all detainers lodged against a prisoner, rather it only applies to those detainers based on an "untried indictment, information or complaint." In *United States v. Roach*, 745 *F.2d* 1252 (9th Cir. 1984), the Ninth Circuit found the language of Article III to be clear and unambiguous:

> The words "indictment," "information," and "complaint" are terms of art with well-understood meanings in the law. They refer to documents charging an individual with having committed a criminal offense. Used in a statute, they must be accorded that meaning . . . Probation violation charges do not fall within that definition, and Congress did not express an intention to make the Agreement applicable to pro-

> bation violation charges. Therefore, the statutory language must be regarded as conclusive. . .

745 *F.2d* at 1254 (citations omitted).

Other courts which have addressed this issue have resolved it based on the plain language of Article III. In *People ex rel. Capalongo v. Howard,* 453 *N.Y.S. 2d* 45 (App. Div. 1982), the court ruled that a probation violation detainer is outside the scope of the IAD because "the violation merely results in resentencing, and does not constitute a new complaint." 453 *N.Y.S. 2d* at 47. Similarly, in *Blackwell v. State,* 546 *S.W.2d* 828 (Tenn. App. 1976), the court reasoned that:

> [t]he term "untried" refers to matters which can be brought to a full trial. In a probation revocation proceeding the trial has already been held and the defendant has been convicted. In such a hearing, the defendant comes before the court in a completely different posture than he does at his trial before conviction.

546 *S.W.2d* at 829.

Such an analysis reflects the view that a probation violation hearing or a parole revocation hearing are simply extensions of the sentencing process rather than new complaints to be "tried." The fact that Article III uses the adjective "untried" to modify the words "indictment, information or complaint" was central to the Arkansas Supreme Court's reasoning that a probation violation detainer is not covered by the IAD. In *Padilla v. Arkansas,* — *S.W.2d* — (Ark., No. CR 83-45, April 18, 1983), the court reasoned that "[a] charge against a defendant does not remain 'untried' after a defendant has pleaded guilty . . . Since appellant had entered a plea of guilty on the charges

underlying the original sentence of probation, there was nothing 'untried' within the meaning of the [IAD] . . ." slip op. at 3.

With the exception of this case, every court in the land which has addressed this issue has held that probation and parole violation detainers are not "untried indictments, informations or complaints." *United States v. Roach,* 745 *F.2d* 1252; *Hopper v. United States Parole Com'n.,* 702 *F.2d* 842 (9th Cir. 1983); *Sable v. Ohio,* 439 *F.Supp.* 905 (W.D. Okla. 1981); *Hernandez v. United States,* 527 *F. Supp.* 83 (W.D. Okla. 1972); *Cart v. DeRobertis,* 453 *N.E. 2d* 153 (Ill. App. 1983); *Padilla v. Arkansas,* — *S.W.2d* — (Ark. 1983); *Maggard v. Wainwright,* 411 *So.2d* 200 (Fla. App. 1982); *Wainwright v. Evans,* 403 *So.2d* 1123 (Fla. App. 1983); *Suggs v. Hopper,* 215 *S.E.2d* 246 (Ga. 1975); *Buchanan v. Michigan Department of Corrections,* 212 *N.W.2d* 745 (Mich. App. 1973); *People v. Batalias,* 316 *N.Y.S.2d* 245 (App. Div. 1970); *People ex rel. Capalongo v. Howard,* 453 *N.Y.S.2d* 45 (App. Div. 1982); *State v. Knowles,* 270 *N.E.2d* 133 (S.C. 1980); *Blackwell v. State,* 546 *S.W.2d* 828 (Tenn App. 1976).

By construing Article III so broadly as to include probation violation detainers within its scope, the Circuit Court has effectively substituted its judgment for the judgment of the legislatures of the States which have adopted the Act. In *People ex rel. Capalongo v. Howard,* 453 *N.Y.S.2d* 45, the court "recognize[d] that the statute commands a liberal construction . . . , but a judicially created extension to include probation violations extends the scope beyond mere liberal construction . . . Substantive changes should await legislation by the signatory States . . ." 453 *N.Y.S.2d* at 46-47.

Significantly, one state, Kentucky, has amended its version of the IAD to specifically provide for coverage of detainers based on violations of probation and parole. Kentucky Revised Statutes Section 440.455(2) provides that:

> [a]ll provisions and procedures of [the Kentucky IAD] shall be construed to apply to any and all detainers based on unheard, undisposed of, or unresolved affidavits and warrants charging violations of the terms of probation and parole.

A request to dispose of a detainer pursuant to the IAD is made under Article III. The article refers only "untried indictments, informations or complaints." The scope of the statute should be limited to the language employed by the legislature. "[A]ny extension of the coverage of the IAD is not a matter for the judiciary, but rather, falls within the province of the legislative branch, as exemplified by Kentucky's specific amendments to its law to accomplish the designed purposes." *Maggard v. Wainwright*, 411 *So.2d* at 202.

POINT TWO: The Circuit Court Erroneously Interpreted The Legislative History Of The Interstate Agreement On Detainers.

In deciding that the phrase "untried indictment, information or complaint" as used in Article III of the IAD included a violation of probation, the Circuit Court and District Court both relied heavily on the comments of the Council of State Governments which drafted the Act in 1956. Central to the District Court's reasoning, which the Circuit Court found "persuasive," was the Council's statement that:

> detainers may be placed by various authorities under varying circumstances, for example, when an escaped prisoner *or a parolee commits a new crime and is imprisoned in another state.*

Council of State Governments, Suggested State Legislation for 1957 at 74. 558 *F.Supp.* at 545 (emphasis added by District Court).

This language, coupled with the assumption that a detainer based on a probation violation will have the same adverse effects on a prisoner's rehabilitation as any other detainer, led the Circuit and District Courts to conclude that the Act was intended to apply to detainers based on probation violation detainers.

This reasoning, however, misinterprets the comments of the Council and the effect of a detainer based on a violation of probation. The commentary relied upon by the District Court is not a description of the type of detainer to which the Council expected the IAD to apply. Rather, it is a statement contained in a longer paragraph that gives a general definition of a "detainer:"

> A detainer may be defined as a warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer. Wardens of institutions holding men who have detainers on them invariably recognize these warrants and notify the authorities placing them of the impending release of the prisoner. Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or a parolee commits a new series crimes in different jurisdictions.

Id. at 74.

The above paragraph aptly defines a "detainer," a definition that obviously encompasses a warrant based on a charge of violation of probation or parole. However,

Article III of the IAD does not apply to all detainers; rather, by its express terms, the IAD is limited to "any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner . . ." *N.J.S.A.* 2A:159A-3. If this commentary was meant to describe the scope of Article III, the statute itself would have simply referred to "detainers."

The Council had good reason to limit the scope of Article III. The IAD is not designed, nor can any legislation be designed, to dispose of every detainer lodged against an out-of-state prisoner. Rather, the Act addresses itself to the problem created by a misuse of the detainer system. Such misuse, whether intentional or negligent, arises from the fact that authorities do not need to make any showing whatsoever before a detainer is lodged at their request.

> Since the legal basis for a detainer is rarely examined, a prisoner can suffer loss of privileges and parole because of a charge for which there is not sufficient proof to obtain an indictment. Undoubtedly, detainers are sometimes used by prosecutors to exact punishment without having to try a charge which they feel would not result in a conviction. Once the detainer is filed by a prosecutor he has no reason to concern himself with the validity of the charge again until the detainee is released by the other jurisdiction. Subsequent discoveries or changes which destroy the basis for the detainer will likely be communicated to the incarcerating authorities only by the most conscientious prosecutors.

Note, *Detainers and the Correctional Process,* 4 Wash. U.L.Q. 417, 423 (1966).

Given the adverse consequences that a detainer will have upon a prisoner's rehabilitative prospects, it is obvi-

ously desirable to ensure that such detainers are based upon a valid charge. The Council of State Governments took note of the "statement of aims of guiding principles" promulgated by a group known as the Joint Committee on Detainers which included the statement that "No prisoner should be penalized because of a detainer pending against him unless a thorough investigation of the detainer has been made *and it has been found valid.*" Council of State Governments, *supra,* at 75 (emphasis added). Most significantly, Article I of the IAD states that "it is the policy of the party states and the purpose of this agreement to encourage the expiditious and orderly disposition of . . . charges and *determination of the proper status* of any and all detainers based on untried indictments, informations or complaints . . ." *N.J.S.A.* 2A:159A-1 (emphasis added). Indeed, even the court below noted the comments of one writer who indicated that:

> The thrust of [the IAD] is not to protect the convict's right to a speedy trial per se, but rather to protect him from the particular disabilities engendered by an untried detainer pending against him while he is serving a prison term. Often the effect of such a detainer, *which could be based upon an unsubstantiated charge,* is to aggravate the punishment received for the original offense.

Note, *The Right to a Speedy Trial and the New Detainer Statutes,* 18 Rutgers L.Rev. 828, 832 (1964) (footnote omitted and emphasis added), quoted at 739 *F.2d* at 882.[3]

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[3] In discussing the proposed companion legislation regarding disposing of detainers within the state (Intrastate Detainer Statute), the Council of State Governments noted that this stat-

(Continued on following page)

If a prisoner has an out-of-state detainer based upon an untried indictment, information or complaint lodged against him, he may invoke his rights under the IAD to have the underlying indictment, information or complaint adjudicated. This will result in either a new conviction, an acquittal, or a decision by the State not to prosecute. If the trial results in a conviction, then the prisoner is returned to the State in which he is serving his original sentence *with a detainer still lodged against him.* The difference, of course, is that the new detainer is based upon the new conviction, not upon an untried indictment, information or complaint. The IAD will have served its purpose; the prisoner—and the correction officials—now know that the detainer has a valid basis. Furthermore, the prisoner whose trial results in an acquittal or a decision by the State not to prosecute, will be returned to the State in which he is serving his sentence without the detainer lodged against him. Again, the IAD will have served its purpose; the prisoner will not suffer the adverse consequences engendered by a detainer based upon an invalid charge. Thus, it is clear that the IAD is not designed to dispose of all detainers; rather, given that detainers based upon untried indictments, informations or complaints "*produce uncertainties* which obstruct programs of prisoner treatment and rehabilitation," *N.J.S.A.* 2A:159A-1, (emphasis added), the IAD seeks to ensure that a detainer lodged against a prisoner is based upon a valid charge.

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ute gives a prisoner "no greater opportunity to escape just convictions, but *it does provide a way for him to test the substantiality of detainers placed against him* and to secure final judgment on any indictments, informations or complaints outstanding against him in the state." Council of State Governments, *supra,* at 76-77 (emphasis added).

The concern over the validity of the charge underlying a detainer is directed towards those detainers in which the underlying charge has not yet been tried. Thus, the IAD is applicable to those detainers based upon "untried indictments, informations or complaints." Conversely, there is no such concern when the detainer is based upon a violation of probation. A probation violation is conclusively established when the probationer is convicted of subsequent crimes. *State v. Zachowski,* 53 *N.J. Super.* 431, 441-42 (App. Div. 1959). In the present case, given his Pennsylvania convictions, respondent Nash could hardly have been uncertain as to his probationary status. His new conviction conclusively established the violation of his New Jersey probation. Thus, the detainer lodged against him was based on a valid charge. If Nash had been returned to New Jersey immediately to resolve the probation violation, he would have been returned to Pennsylvania after being re-sentenced *with a detainer still lodged against him.* Even if the New Jersey sentence was imposed concurrently with his Pennsylvania sentence, Nash would still have been returned to Pennsylvania with a detainer lodged against him to ensure service of his New Jersey sentence. As a practical matter, Nash's detainer would still be lodged against him whether he could make use of the IAD or not. The IAD is of no use to prisoners faced with a detainer based on a probation violation. Such detainers are always valid since the violation is conclusively established by the new conviction. On the other hand, the IAD is of great value to prisoners facing untried charges. By adjudicating the underlying charge, a prisoner can escape the burdens caused by a detainer based upon an invalid charge. Thus, Article III limits the scope of the Act to those detainers based upon "untried indictments, informations or complaints."

The Circuit Court felt that in a "significant number" of cases, the probation violation charge lodged against the prisoner incarcerated out-of-state would be based not on the new conviction, but rather upon technical, non-criminal violations of the prisoner's probation agreement. 739 *F.2d* at 882 n.7. However, the Act only may be invoked by a person who "has entered upon a term of imprisonment in a penal or correctional institution of a party State . . ." *N.J.S.A.* 2A:159A-3(a). Thus, if a defendant is incarcerated in another state, the probation or parole violation detainer will always be based on the new conviction in that state, rather than on any technical violation of the terms of probation. While there may in fact be other technical violations, in the context of the IAD there will always be a violation based upon the new conviction.

The limiting language of Article III demonstrates that the drafters of the IAD were aware of the qualitative differences between detainers based on "untried indictments, informations or complaints" and those based on violation of probation or parole. The former raise legitimate concerns over final adjudication of guilt or innocence and uncertainties concerning a prisoner's release date both of which will interfere with the rehabilitative process. No such problems are raised by the latter.

POINT THREE: While The Interstate Agreement On Detainers Is Designed To Preserve A Prisoner's Speedy Trial Rights, A Right To A Speedy Trial Is Not Implicated With A Probation Or Parole Violation.

Besides being a mechanism whereby the uncertainty over the validity of a detainer can be alleviated, the IAD

is also designed to effectuate a prisoner's Sixth Amendment right to a speedy trial. Indeed, in *Smith v. Hooey,* 393 *U.S.* 374 (1969), the Court held that an inmate incarcerated out-of-state who has an untried charge pending in another State has a constitutional right to a speedy disposition of that charge.

The IAD itself clearly states that it is the finding of the party States that many of the uncertainties that obstruct prisoner rehabilitation are caused by "difficulties in securing speedy trial of persons already incarcerated in other jurisdictions." *N.J.S.A.* 2A:159A-1. The congressional legislative history surrounding the IAD's enactment into federal law is also illuminating.[4] Senator Hruska sponsored the bill on the Senate floor and declared:

> At the heart of this measure is the proposition that a person should be entitled to have criminal charges pending against him determined in expeditious fashion—another manner of stating the speedy trial guarantees of the Constitution.

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[4] In *Cuyler v. Adams,* 449 *U.S.* 433, the Court was presented with the question of whether a state prisoner transferred involuntarily under article IV of the IAD had a right to a pre-transfer hearing. The case involved the transfer of a Pennsylvania state prison inmate to New Jersey to answer state criminal charges. In answering the question in the affirmative, the Court looked to the plain language of the Act, the legislative history generated by the Council of State Governments, and the federal legislative history surrounding Congress' enactment of the IAD in 1971. Given that the IAD is a federal law, the federal legislative history is likewise instructive on the issue of whether the IAD applies to probation or parole violation detainers.

116 *Cong. Rec.* 38840. The Senate Committee considering the legislation likewise stated:

> The committee is of the opinion that the enactment of this legislation would afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right.

Id. at 38841.

In *Hopper v. United States Parole Com'n,* 702 *F.2d* 842 (9th Cir. 1983), the court dealt with a situation in which the Parole Commission lodged a detainer against a California prisoner for violation of parole. In March 1981, the prisoner requested a transfer to federal custody for a parole revocation hearing. When the hearing had not taken place by December 1981, the prisoner filed a habeas corpus petition alleging, *inter alia,* that the parole revocation charge must be dismissed due to a lack of a timely hearing as required by the IAD. The Ninth Circuit rejected this argument and held "that an unadjudicated parole violator warrant is not a 'complaint' within the meaning of article III. . . ." 702 *F.2d* at 845.

The Court's analysis in *Hopper* focused on the Congressional legislative history. Congress referred to prisoners "convicted on the new charges," 1970 *U.S. Code Cong. & Ad. News* 4865 the "threat of another prosecution," 116 *Cong. Rec.* 38840, and a "request [for] trial." *Id.* at 38841. Additionally, the legislative history made it clear that "Congress was in part addressing their concern with recent Supreme Court cases vacating state charges, where the state had failed to bring a defendant to trial for a number of years while the defendant was serving time in a federal penitentiary." 702 *F.2d* at 846.

This concern for a prisoner's speedy trial rights is logically consistent with the limiting language of Article III. In the case of a probation or parole violation detainer, the speedy trial rights of the prisoner are not implicated. The Circuit Court observed that "[a]lthough there is no constitutional right to a speedy adjudication in probation violation cases, we believe that concern for a fair adjudication, as well as concern for constitutional rights, should inform our interpretation of the IAD." *Nash v. Jeffes,* 739 *F.2d* at 882, n.7.[5] This concern, however, was raised in the context of the probation violation based on a "non-criminal act which is prohibited by the terms of probation" where "the prisoner's opportunity for a fair adjudication may be compromised by delay." *Id.* As discussed earlier, the IAD only becomes relevant when a person is serving a term of imprisonment in another state. Thus, the probation violation in this context will never be based on a non-criminal act; rather, the violation will always be based on the new conviction which results in the out-of-state term of imprisonment Since this conviction conclusively establishes the probation violation, the delay will not pose any risk to the prisoner's fair adjudication of the charge.

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[5] In *Moody v. Daggett,* 429 *U.S.* 78 (1976), the court held that a prisoner serving a sentence for a crime he committed while on parole has no constitutional right to have a parole violation warrant executed promptly when he is serving the sentence for the same sovereign. The court left open the question of a parole violation serving his intervening sentence in another jurisdiction.

CONCLUSION

For the foregoing reasons, the State respectfully submits that a detainer based on a violation of probation or parole is not within the scope of the IAD, and asks that the decision of the Circuit Court be reversed.

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